(5)

No. 00-219

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

CONCHO RESIDENTIAL SERVICE, INC., Petitioner

VS.

MHMR SERVICES FOR THE CONCHO VALLEY a/k/a CONCHO VALLEY CENTER FOR HUMAN ADVANCEMENT, In Its Capacity As An Unincorporated Association, Its Capacity As A Mental Retardation Authority And As A Purported Community MHMR Center; JAMES YOUNG, JOE FINN, KAREN SHEPPARD, JOHN BRUBAKER, TOM GREEN COUNTY, CITY OF SAN ANGELO, THE TEXAS COUNCIL OF COMMUNITY MHMR CENTERS, INC., SPENCER MCCLURE, TEXAS COUNCIL RISK MANAGEMENT FUND, BOARD OF TRUSTEES OF THE TEXAS COUNCIL RISK MANAGEMENT FUND, AS TRUSTEE OF THE LIABILITY TRUST ACCOUNT, THE PROPERTY TRUST ACCOUNT, AND THE WORKERS' COMPENSATION TRUST ACCOUNT, BRIAN CREWS, JI SPECIALTY SERVICES, INC., CENTRAL PLAINS CENTER FOR MHMR AND SUBSTANCE ABUSE, HALE COUNTY; and RICHARD HALL, HECTOR CANTU, JAMES COFFEY, RUBY GUTTIEREZ, SHEIRRAN HUGHES, BRENDA MORRIS, JACQUELINE SHANNON, ROGER SIDENER,, Respondents

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On Petition For Writ Of Certiorari to the Court Of Appeals, Third Supreme Judicial District, at Austin, State of Texas, No. 03-98-00022-CV

REPLY BRIEF FOR PETITIONER

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Abbreviations

TGC Br.	Brief In Opposition Of Tom Green County
CV Br.	Brief In Opposition Of Concho Valley et al.
Pet.	Petition for writ of certiorari
Pet. App.	Appendix to petition for writ of certiorari
CR	Clerk's Record

Corporate Disclosure

Petitioner's prior statement (Pet. i) remains valid.

I. Compelling Need For Review

Laws protecting mentally retarded citizens are worth little if ignored and unenforced. The Factual Chronology (Pet. 2-8) shows CONCHO VALLEY acted as if it were above the law, and its principals TOM GREEN COUNTY and CITY OF SAN ANGELO seem to look the other way. The courts below have reinforced that cavalier attitude.

Texas' Third Court Of Appeals has mis-stated federal antitrust law and ignored federal medicaid law in exempting from the Texas antitrust act wrongful conduct that injured CRS and betrayed Texas' most vulnerable citizens. Review will shine the rule of law upon a dark corner of public administration in Texas, and caution courts against careless use of *Parker* to excuse public antitrust violators.

II. Not Publishing Opinion Should Not Evade Review

The Third Court Of Appeals' order to not publish its precedent-laden opinion should not exempt it from Supreme Court review. State courts should not be able to use non-publication to avoid review of their mishandling of federal law. Review will show courts that federal law cannot be misused, nor review circumvented, by so transparent a ploy.

III. Independent State-Law Ground Ignores Medicaid Laws, Agency Policies

The Third Court Of Appeals alternately held, twice, that the Texas antitrust act's own "state action" exemption, in Tex. Bus. & Com. Code §15.05 (g) (West 1994), immunizes the respondents' injurious conduct. Respondents make much of this, yet, like the state appeals court, never come to grips with petitioner's analysis. Petitioner addressed that inde-

pendent state-law ground twice, noting medicaid law and state agency policies in no way "required or affirmatively approved", but rather forbid, CONCHO VALLEY's refusing to offer inquiring parties the choice of CRS' homes (Pet. 13, 14, 23-26).

Petitioner's Appendix inadvertently omitted from page 25 a paragraph of the Third Court of Appeals' opinion containing the alternate holding with respect to CONCHO VALLEY. The undersigned counsel takes full responsibility and sincerely apologizes to the Court for the omission. The omitted paragraph[1] reads as follows:

> *In addition, the Texas Act includes its own state-action exemption. Section 15.05 of the Antitrust Act specifically exempts 'actions required or affirmatively approved by any statute of this state . . . or by a regulatory agency of this state . . . acting under . . . statutory authority vesting the agency with such power.' See Bus. & Com. Code § 15.05(g). Accordingly, we hold that the trial court properly granted a take-nothing summary judgment against CRS on its antitrust claims against Concho Valley and Central Plains.*

The Third Court Of Appeals' opinion raised that alternate state-law ground a second time, regarding Tom Green County (Pet. App. 26), which is where petitioner addressed it (Pet. 14, 2nd par., 23-26), as well as addressing it generally. Pet. 13, 2nd and 3rd par. Petitioner's Question #4 (Pet. 23-26)

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[1] The omitted paragraph should have appeared as the first complete paragraph on Pet. App. 25, followed by the paragraph there that begins "Furthermore, the individuals ... ."

details the law and agency policies that show CONCHO VALLEY's practice of not informing inquiring persons of the choice of CRS' ICF/MR homes violated federal and state medicaid law and the policies of Texas' Department of Mental Health and Mental Retardation ("TDMHMR") and Department of Human Services ("TDHS").

IV. Important Federal Questions Raised

Petitioner's five "Questions Presented" each raise important issues of federal law:

Question #1. LGAA of 1984 Misinterpreted, Merely Limits Remedies. Respondents hoist a red herring with the response that CRS is not seeking antitrust injunctive relief. CV Br. 4-5, TGC Br. 11. That is irrelevant to the Third Court Of Appeals' flawed federal statutory construction (Pet. App. 26). The court reasoned:

Premise #1. The Texas antitrust act exempts "activities"[2]

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[2] Some activities of private actors are statutorily exempted from the operation of the federal antitrust laws, including non-profit labor, agricultural and horticultural organizations, 15 USCA §17 (1997); agricultural producers, 7 USCA §§291, 292, 608b, 608c (1999); fishing industry, 15 USCA §521 (1997); insurance business if every State, D.C., Guam, and Puerto Rico regulate it, 15 USCA §§1012, 1015 (1997); newspapers, 15 USCA §1801 (1998).

Other activities are judicially-exempted from the operation of the federal antitrust laws. Federal case law exempts licensing and assigning patents, *U.S. v. Line Material Co.*, 333 U.S. 287, 309 (1948); baseball, *Flood v. Kuhn*, 407 U.S. 258, 284 (1972); and private citizens petitioning to change the law, *Eastern Railroad Pres. Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140 (1961); *UMW Of America v. Pennington*, 381 U.S. 657, 670 (1965). These exemptions might not be incorporated by the Texas antitrust act since it expressly rejects federal decisions that do not promote economic competition. Tex. Bus. & Com.

that are exempt from the "operation" of federal antitrust laws.

Premise #2. Local government activities are exempt from the operation of the federal antitrust laws because LGAA "expressly immunizes all local governmental entities from antitrust liability under the Clayton Act." Pet. App. 26.

The court's error lies in Premise #2. The LGAA of 1984 does limit remedies, but does not exempt any activities of local governments from the operation of the federal antitrust laws. Nor does it make them immune from liability. Local governments' activities are still circumscribed by federal antitrust law, and when they violate that law, they remain liable to injured parties for equitable remedies. Thus, their activities are still subject to the operation of those laws, denying them the Texas exemption.

Question #2. Insufficient *Parker* Inquiry By State Courts. Contrary to respondent's assertion (CV Br. 5), this question does not challenge the Third Court of Appeals' ruling that the **Parker** doctrine is incorporated into the Texas antitrust act. (Question #4 does that.) This question presumes it is incorporated, but contends that the level of factual inquiry and explanation by which the lower courts found *Parker* "state action" to exist in this case was not sufficiently

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Code §15.04 (West 1994). Pet. App. 6.

Since the *Parker* doctrine does not promote economic competition, that federal decision would also be rejected by §15.04. Moreover, since *Parker* inherently cannot operate in all federal jurisdictions, *Parker* could not, even theoretically, make an activity "exempt from the operation of the federal antitrust laws". If parallel "state action" in all 50 states exempted the same activity, it still would not be exempt in D.C., Puerto Rico, and territories where the federal antitrust laws also operate. 15 USCA §§3, 13 (1997).

rigorous. The degree of judicial investigatory and explanatory rigor required to erect the protection of the disfavored *Parker* immunity is an element of the *Parker* doctrine and thus a federal question.

A related federal issue is whether the Third Court of Appeals' lax application of judicial effort and expertise, and failure to craft an acceptably rigorous opinion, violates the ADA, a complaint that could not antedate the court's ruling.

Question #3. Legal Fiction Cannot Guide "State Action" Test. Whether, under the disfavored *Parker* doctrine, a court may decide the appropriate "actor" test based on a single legal fiction describing the actor, and ignore contrary legal fictions and the objective characteristics of the actor, is plainly a federal question. To select the least rigorous "state actor" test over the "municipal" or "private" actor tests, solely based on a limited-purpose legal fiction, is impermissibly arbitrary.

The Third Court Of Appeals' sole basis for applying the "state actor" test to CONCHO VALLEY was a single legal fiction. The court cited Tex. Health & Safety Code §534.001, which says a community MHMR center is an "agency of the state" for purposes of the Texas Tort Claims Act. Pet. App. 25. The court ignored the long list of contrary objective characteristics (Pet. 16-21) that configure CONCHO VALLEY as a local public organization and commercial contractor.

This issue also relates to Question #2 on the minimum judicial inquiry needed to invoke *Parker*, because the court even ignored contrary legal fictions contained in the same

sentence in §534.001,[3] which were enacted later in time (Pet. 16, fn 33, 34, 35) and say a community center is a local government and a unit of local government for limited purposes. The state court's apparent carelessness in applying a disfavored federal immunity to deny an injured party legal redress furnishes the setting for the High Court to address the minimum judicial rigor required to impose such an immunity.

Question #4. Parker "State Action" Doctrine Not Incorporated Into Texas Antitrust Act. This is a federal question about the unique character of the *Parker* doctrine. The Third Court Of Appeals mis-characterized the *Parker* doctrine when it held it was incorporated into the Texas antitrust act. It held that *Parker* is a federal judicial interpretation of a federal antitrust statute comparable to Texas' antitrust statute. Pet. App. 24, lines 5-8. That proposition is impossible in our federal system. *Parker* is inherently and exclusively an interpretation of unique federal antitrust law.

From the perspective of a state antitrust statute, the *Parker* doctrine cannot be a federal judicial interpretation of a comparable federal statute. *Parker* is based on the national government's deference to state sovereignty in our federal system, and the presumption that Congress did not intend the federal antitrust statutes to impinge on state sovereignty. Since a state does not have any lower co-sovereign to defer to, in that respect its antitrust statute is inherently incapable of being comparable to the federal statute and has no comparable need for a *Parker*-like doctrine.

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[3] In June 1989, when the injuries to petitioner CRS began, the statute was found at Tex. Rev. Civ. Stat. Ann. art. 5547-203, §3.01 (c) (Vernon Supp. 1988). Pet. App. 3. In 1991 it was recodified as Tex. Health & Safety Code Ann. §534.001.

Note that the Texas legislature, in the Texas antitrust act (Pet. App. 5-7), nowhere mentions *Parker* or expressly directs its use as a model. Since the Texas legislature enacted its own "state action" doctrine ("required or affirmatively approved") which supplies one simple test for all actors, why would it confuse things by obliquely incorporating another model, particularly *Parker*, which is based on uniquely federal concerns and more complex in application?

Question #5. CONCHO VALLEY Did Not Satisfy Minimum Due Process To Become A Lawful Community Center. Whether the minimum formative acts and documentation required by due process were timely supplied, so that CONCHO VALLEY became a lawful public body and community center enjoying attendant governmental immunities, raises the federal question of what due process requires.

V. Miscellaneous Objections By Tom Green County

(i) Record references. Tom Green County says CRS did not show it raised antitrust issues in the trial court with respect to the County. TGC Br. 7. The references in "Plaintiff's First Amended Response To Defendants' Motions For Summary Judgment", which petitioner cited in Pet. 8-9, apply to Tom Green County because the arguments in that response were expressly incorporated by reference, twice, into the summary judgment response petitioner filed with respect to Tom Green County (and duly served on its counsel). CR 1112, 1117.

(ii) Derivative liability. TGC Br. 18. Tom Green County's vicarious liability for the actions of CONCHO VALLEY arises from the common law of agency and associations. Counties' governmental immunity is repealed by the Texas antitrust act. Pet. 13, 1st par. Whether official

immunity can cover these misdeeds is a fact question for trial.

(iii) Applicability of medicaid law. In addition to the references at Pet. 23-24, the record below is replete with references showing the applicability of medicaid law. CR 962, "Texas began voluntary participation in the Title XIX Intermediate Care Facility for the Mentally Retarded (ICF/MR) program in 1972.", TDMHMR's Annual Plan for New Bed Development in the Texas ICF/MR Program for State Fiscal Year 1990, p. 1; CR 631, "Medicaid-funded services provided by [community MHMR] centers include ICF MR, ... Case Management ... and Diagnostics for people with mental retardation.", Texas Health & Human Services Commission's Medicaid Office, "Glossary Texas Medicaid Terms", Texas Medicaid In Perspective, May 1994, cited in Pet. 25, fn 63; CR 638, "ICF MR - (Intermediate Care Facility for Mentally Retarded persons) Optional Medicaid service which provides residential care and services for individuals with a diagnosis of mental retardation.", *id.*; CR 480-481, contract between petitioner CRS and Texas Dept. of Human Services for CRS to provide ICF/MR services under the Texas Medical Assistance Program and receive Title XIX medicaid payments for persons served in home at 2706 Watson St., San Angelo, Texas; CR 1639, TDMHMR Commissioner Don Gilbert affidavit: "To participate in the ICF/MR program and provide ICF/MR services to Medicaid beneficiaries, the provider must qualify for participation in the Title XIX Texas Medical Assistance Program ...."

(iv) Standing, Question #5. An injured private party may attack collaterally a void public organization. *City of West Lake Hills v. State Ex. Rel. City Of Austin*, 406 S.W.2d 722, 727 (Tex. 1971). The formation of CONCHO VALLEY was void because it did not colorably comply with the

community center enabling act and possibly because the act itself is void for uncertainty as a matter of due process.

(v) Causation, Question #5. TGC Br. 10-11. The harm caused by CONCHO VALLEY's representation that it was a lawful community MHMR center, when it was not, is that that status entitled it to be the "designated provider" and the "Mental Retardation Authority" (Pet. 3, 5th, 6th par.; Pet. 4, 1st par.), making it the regional clearinghouse for informing inquiring persons about facilities and services available in the area, a power it used to block access to CRS' homes.

(vi) Raising due process issue, Question #5. TGC Br. 7-9. In its response to the summary judgment motion in the trial court, CRS argued: "A genuine issue of fact exists regarding whether Defendant [CONCHO VALLEY] was a lawful community MHMR center at all times during the period from 1988 through the present." CR 2994. Petitioner submits that fairly raises the legal issue of what minimum amount of procedure and documentation for a lawful community center is required by due process. Moreover, Texas law allows petitioner to raise the due process issue at any point if it is "fundamental error". Fundamental error exists in a civil case where the record shows the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 328 (Tex. 1993). The public, especially mentally retarded citizens, are directly and adversely affected if an imposter community center, formed without satisfying due process, is withholding vital residential information from mentally retarded persons who need a safe place to live, and claiming governmental immunity when anyone complains. Factual Chronology, Pet. 5-8. That public interest is declared in the laws and policies that guarantee freedom of choice. Pet. 23-26.

(vii) Seriatim? The size of this case reflects serial offenders, not seriatim, and tracks the gradual revelation of an astonishingly broad disregard of the law by public actors.

(viii) Issues before Texas Supreme Court. Since the Texas Supreme refused discretionary review (Pet. 1), petitioner understands it is not required to show it raised these issues before that court. However, its "Petition For Review" to the Texas Supreme Court listed the same 16 "Issues Presented" as were in its brief filed with the Third Court of Appeals. The Texas Supreme Court says each such issue in a petition for review "...will be treated as covering every subsidiary question that is fairly included," Tex. Rules of Appellate Proc. 53.2 (f) (West 2000), and "[t]he argument [in the petition for review] need not address every issue or point included in the statement of issues or points. Any issue or point not addressed may be addressed in the brief on the merits if one is requested by the Court." *Id.*, 53.2 (j).

CONCLUSION

Wherefore, Petitioner respectfully asks the U.S. Supreme Court to grant its petition for writ of certiorari.

Respectfully submitted,

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September 21, 2000